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In the Supreme Court of the United States

OCTOBER TERM, 1987

COIT INDEPENDENCE JOINT VENTURE, PETITIONER

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION AS RECEIVER FOR FIRSTSOUTH, F.A.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF THE FEDERAL HOME LOAN BANK OF DALLAS, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, AND FEDERAL HOME LOAN BANK OF TOPEKA FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AS AMICI CURIAE SUPPORTING AFFIRMANCE

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MOTION OF THE FEDERAL HOME LOAN BANK OF DALLAS, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, AND FEDERAL HOME LOAN BANK OF TOPEKA FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to Rule 36 of the Rules of this Court, amici curiae Federal Home Loan Bank of Dallas, Federal Home Loan Bank of San Francisco, and Federal Home Loan Bank of Topeka request leave to file the accompanying brief as amici curiae in support of affirmance of the court of appeals' judgment. Counsel for respondent has consented to the filing of this brief; however, ~~we have been unable to reach~~ counsel for petitioner ~~to obtain his consent.~~ has refused consent.

Amici curiae are three of the twelve regional Federal Home Loan Banks (District Banks). Each District Bank is a federal instrumentality organized in the form of a corporation. All of the stock of each District Bank is owned by its members, which consist predominantly of federally-insured savings and loan institutions. 12 U.S.C. 1424, 1426. The primary function of the District Banks

is to make advances (loans) to their member institutions to assist those institutions in making home mortgage loans. 12 U.S.C. 1430. As of December 31, 1987, the three amici District Banks had outstanding advances to members in excess of $50 billion.

Member institutions within the three Districts represented by amici have experienced a disproportionate number of insolvencies in recent years. Each District Bank is typically the second largest creditor (behind only the Federal Savings and Loan Insurance Corporation itself) of such failed institutions. In addition, Congress recently has required the District Banks to contribute heavily to the recapitalization of the FSLIC insurance fund. See Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 302, 101 Stat. 552, 587. Thus, amici have a vital interest in the integrity of the federal deposit insurance system, as well as the health of the savings and loan industry generally and federally-insured institutions in particular. The expeditious and orderly resolution of FSLIC receiverships established to conduct the liquidation of failed institutions is of paramount importance to the protection of these interests.

For the foregoing reasons, the motion of the Federal Home Loan Bank of Dallas, the Federal Home Loan Bank of San Francisco, and the Federal Home Loan Bank of Topeka to file the accompanying brief as amici curiae in support of affirmance should be granted.

Respectfully submitted.

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QUESTIONS PRESENTED

1. Whether claims against the assets of an insolvent, federally-insured savings and loan association must be presented in the first instance in federal receivership proceedings in accordance with the Federal Home Loan Bank Board's regulations for the administrative resolution of such claims.

2. Whether requiring creditors of insolvent, federally-insured savings and loan associations to exhaust their administrative remedies under the Band Board's regulations prior to seeking judicial review under the Administrative Procedure Act violates Article III of the Constitution, the Due Process Clause of the Fifth Amendment, or the Seventh Amendment right to trial by jury.

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BRIEF FOR THE FEDERAL HOME LOAN BANK OF DALLAS, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, AND FEDERAL HOME LOAN BANK OF TOPEKA AS AMICI CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE AMICI CURIAE

The interest of the amici curiae is described in the preceding motion for leave to file this brief.

SUMMARY OF ARGUMENT

1. a. The court of appeals correctly concluded that the Federal Savings and Loan Insurance Corporation has exclusive authority to adjudicate claims against failed savings and loan institutions in the first instance. Congress has directed FSLIC to liquidate insolvent S&Ls "in an orderly manner" (12 U.S.C. 1729(b)(1)(A)(v)) and to "pay all valid credit obligations" (12 U.S.C. 1729 (b)(1)(B)), while at the same time prohibiting any judicial proceedings that would "restrain or affect" FSLIC's performance of these functions as receiver. 12 U.S.C. 1464(d)(6)(C). Without question, permitting courts across the country to adjudicate claims in the first instance would significantly delay the liquidation of failed S&Ls, add considerable expense to the cost of liquidation, and present the Federal Home Loan Bank Board and FSLIC with the danger of inconsistent judgments concerning the *same* receivership assets. These results are plainly incompatible with Congress's intent that liquidations be conducted expeditiously and in an orderly manner.

b. This reading of the governing statutes is supported by long-standing administrative interpretation. For over 30 years, the Bank Board's regulations have instructed FSLIC to allow or disallow claims, powers that this Court has held are synonymous with adjudication. *Katchen* v. *Landy*, 382 U.S. 323, 329 (1966). Congress has never disturbed the Bank Board's interpretation of

FSLIC's adjudicatory authority. That interpretation of the expert agency is therefore entitled to great weight.

c. Congress's recent amendment to the Federal Credit Union Act also reinforces the Bank Board's interpretation of FSLIC's governing statutes. Congress gave the National Credit Union Administration Board the same freedom from judicial restraint of its receivership powers that FSLIC has enjoyed for decades. The Senate Report stated unequivocally that the amendment was designed to clarify the NCUAB's authority to adjudicate claims, subject only to judicial review under the Administrative Procedure Act. S. Rep. No. 19, 100th Cong., 1st Sess. 25 (1987). This confirms that FSLIC's identically-worded statutory authority should be interpreted in the same manner.

2. Coit's constitutional challenges to FSLIC's and the Bank Board's exclusive adjudicatory authority are not ripe, because Coit has not yet exhausted its administrative remedies. Even if those challenges were properly before the Court, however, they are without merit.

a. Article III of the Constitution is not violated by according FSLIC exclusive authority to adjudicate claims, subject to Bank Board and judicial review. See *CFTC* v. *Schor*, 106 S.Ct. 3245, 3258 (1986). First, Congress has reserved all of the essential attributes of judicial power to Article III courts. Second, Congress empowered FSLIC to adjudiciate only claims against assets of insolvent S&Ls that are in its possession. Because adjudication of such claims is essential to the "restructuring of debtor-creditor relations," the claims are of the kind that Congress permissibly may delegate to an agency for initial adjudication. See *Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (plurality opinion). Finally, Congress had compelling reasons that fully justify its decision to centralize claims against the assets of failed S&Ls in a single administrative forum.

b. Nor does FSLIC's adjudication of claims per se violate due process. Congress has mandated that FSLIC

pay all valid claims to the extent of available assets and treat all claimants fairly. FSLIC, like any agency, is entitled to a presumption that it will act according to its statutory mandate. Furthermore, Bank Board and judicial review provide adequate safeguards against possible due process violations in a particular case.

c. Finally, the Seventh Amendment does not bar otherwise valid delegations of adjudicatory authority to administrative agencies. See *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 460 (1977). Therefore, if FSLIC's exclusive authority to adjudicate claims in the first instance comports with Article III and due process, Coit's Seventh Amendment challenge adds nothing to its argument. In any event, the claims FSLIC adjudicates, like the claims adjudicated by bankruptcy referees under the Bankruptcy Act of 1898, are equitable in nature and thus are not subject to the Seventh Amendment's jury trial right.

ARGUMENT

This case comes to the Court at a time when the savings and loan industry is in the midst of its worst financial crisis since the Great Depression. Currently, FSLIC is serving as receiver for over 60 S&Ls that the Bank Board has found to be insolvent. As a consequence, FSLIC's insurance fund is under the most severe pressures it has ever faced. The General Accounting Office recently determined that the fund was insolvent by more than $13.7 billion. See *Hearings Before the Sen. Comm. on Banking, Housing & Urban Affairs*, 100th Cong., 2d Sess. (May 19, 1988) (statement of Frederick D. Wolf). Because of the extraordinary number of S&L insolvencies in recent years, FSLIC's reserves have been insufficient to permit it to close any but the weakest institutions. See Barth, Brumbaugh, Sauerhaft & Wang, *Insolvency and Risk-Taking in the Thrift Industry: Implications for the Future*, 3 Contemp. Policy Issues 1, 4-6, 15 (Fall 1985).

Congress gave the Bank Board exceptionally broad power to issue regulations governing the conduct of re-

ceiverships. As this Court stated in regard to the Board's similarly worded power to regulate ongoing S&Ls, "[n]owhere [in the legislative history] is there a suggestion of any intent somehow to limit the Board's authority." *Fidelity Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 164 (1982). Pursuant to this broad grant of authority, the Bank Board has set forth comprehensive procedures for the administrative determination of claims against insolvent S&Ls.

These procedures provide the regulators of the S&L industry with an essential tool—the ability to conduct liquidation proceedings in an orderly and expeditious manner by consolidating all creditor claims against an insolvent S&L in a single forum for initial resolution. Without this tool, FSLIC would incur greatly added expense in liquidating insolvent S&Ls, would suffer substantial delays between the time it paid insurance to the S&L's depositors and the time it could recover the depositors' claims against the S&L to which it has become subrogated, and would have no reasonable expectation of receiving interest on the money it had lost in the interim.

Accordingly, we fully endorse the Solicitor General's argument that these procedures validly create a mandatory exhaustion requirement. In addition, we believe that Coit's challenge to the standard of judicial review of the denial of a creditor's claim is not ripe, because Coit's claim has not yet been acted on administratively and may ultimately be resolved without the need for judicial proceedings. In the event that the Court reaches the standard of review issue, however, we submit that the power of FSLIC and the Bank Board is not limited to deciding merely whether to contest payment of a creditor's claim. On the contrary, we endorse the Bank Board's longstanding interpretation of its statutes and regulations as authorizing FSLIC to determine in the first instance claims against an insolvent S&L for which it is serving as receiver. Those determinations are subject to review by the Bank Board and, ultimately, by the federal district courts acting pursuant to the Administrative Procedure Act.

I. FSLIC HAS EXCLUSIVE AUTHORITY TO ADJUDICATE IN THE FIRST INSTANCE CLAIMS AGAINST AN INSURED S&L FOR WHICH IT IS SERVING AS RECEIVER

A. FSLIC's Assertion Of Exclusive Authority To Adjudicate Claims In The First Instance Is Consistent With Principles Of Statutory Construction.

1. *The language of the savings and loan statutes makes clear that Congress intended FSLIC to have exclusive authority to adjudicate claims in the first instance.*

During the past 50 years, Congress has enacted a number of statutes expressly designed to empower the Bank Board and FSLIC to oversee the affairs of federally-insured savings and loan associations. When these statutes are read as a whole, it becomes plain that Congress gave FSLIC the authority to adjudicate in the first instance claims against an insured S&L for which it is serving as receiver.[1]

To begin with, the National Housing Act instructs FSLIC to undertake liquidations "in an orderly manner," 12 U.S.C. 1729(b)(1)(A)(v), 1729(c)(3)(B), and, to the extent money is available, to "pay all valid credit obligations of [the S&L being liquidated]." 12 U.S.C. 1729(b)(1)(B), 1729(c)(1)(A), 1729(c)(1)(B)(i)(II). To carry out this mandate, the NHA gives FSLIC the power "to settle, compromise, or release claims in favor

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[1] Throughout this brief, when we refer to FSLIC's authority to adjudicate claims, we are referring to FSLIC's authority to allow or disallow claims *subject to review by the Bank Board*. Although FSLIC is empowered to determine the validity of claims, its determinations are accorded no deference on administrative review. FSLIC's determinations become the final decision of the agency only if there is no request for review or if the Bank Board adopts those determinations.

of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board * * *." 12 U.S.C. 1729(d). Meanwhile, the Home Owners' Loan Act gives the Bank Board broad authority "to make rules and regulations for the reorganization, consolidation, liquidation, and dissolution of [insolvent S&Ls] * * * and for the conduct of conservatorships and receiverships * * *." 12 U.S.C. 1464(d)(11). Finally, to further assist FSLIC in performing liquidations in an orderly manner and in paying all valid credit obligations to the extent of available assets, the HOLA provides that "no court may * * *, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver." 12 U.S.C. 1464(d)(6)(C).

Thus, Congress has expressly prohibited court interference with FSLIC's statutory duties to liquidate S&Ls in an orderly manner and to pay all valid credit obligations. As we show below, court jurisdiction to conduct *de novo* adjudication of claims would interfere with these duties and therefore is barred by statute.

First, permitting courts to make *de novo* determinations of claims would engender significant delay in winding up the affairs of an S&L in receivership. Judicial adjudication of claims entails different statutes of limitations for different claims. Most of these statutes provide substantially greater time for filing a claim than do the Bank Board's regulations, which permit the Board to set a deadline as short as 90 days from the date of the notice to the potential claimants. 12 C.F.R. 549.4(a), 549.5-1(b)(1), 569a.8(a). Furthermore, the calendars of many courts in this country are extremely overburdened, resulting in significantly delayed trial dates. See, *e.g.*, *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981) (recognizing "today's crowded dockets"). Finally, because most courts are courts of general jurisdiction, they may have less experience than FSLIC and the Bank Board in deciding the types of legal or factual

disputes that are common to claims against S&Ls. FSLIC and the Bank Board have special expertise as to the vast majority of contested claims against receivership assets. These claims tend to involve loans, real estate transactions, and securities law issues that are heavily regulated by the Bank Board, see, *e.g.*, 12 C.F.R. 545.32-545.53, 563.9-3 (regulating loan practices); 12 C.F.R. 563.9-8 (regulating real estate transactions); 12 C.F.R. 563.5, 563.7-2, 563.7-4, 563.7-5, 563.8-1, 563.13-2, Pts. 563d, 563g (regulating issuance of securities), and that FSLIC and the Board have repeatedly adjudicated over the history of FSLIC receiverships.

As a result, judicial adjudication of creditors' claims through trial and appeal would take significantly longer than the administrative process. And because FSLIC as receiver generally cannot fix the time and manner of distribution of assets until it knows which claims are valid,[2] permitting judicial adjudication in the first instance would result in delay in the distribution of assets to all creditors, not just those who take the judicial route. Such delay runs contrary to Congress's intent that FSLIC

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[2] Coit argues (Br. 21 n.18) that FSLIC has the option of undertaking a preliminary distribution, reserving funds for claims that have not yet emerged from the judicial forum. Theoretically, this is true. In practice, however, the dollar amount of claims against the receivership estate for which FSLIC would need to reserve often would be so large that preliminary distributions would of necessity be quite small. Furthermore, to make even small distributions, FSLIC likely would need to wait until a substantial percentage of claims have been resolved in the judicial arena.

Similarly, Coit suggests (Br. 20-21) that FSLIC can avoid delayed payment of creditors' claims by using purchase and assumption transactions rather than liquidating receiverships. For federal associations like FirstSouth, as well as for many state-chartered institutions, this approach essentially makes all creditors whole at the expense of the FSLIC insurance fund. Under such an approach, the cost to FSLIC of entering into a purchase and assumption agreement would far exceed the cost of liquidating the institution. As such, the Bank Board is required by law to eschew a purchase and assumption in favor of liquidation. See 12 U.S.C. 1729(f)(4)(A).

"be able to act quickly and decisively in reorganizing, operating, or dissolving a failed institution." *North Mississippi Savings & Loan Ass'n* v. *Hudspeth*, 756 F.2d 1096, 1101 (5th Cir. 1985), cert. denied, 474 U.S. 1054 (1986). Indeed, in recently giving the National Credit Union Administration Board exclusive power to adjudicate claims against insolvent credit unions, Congress reiterated this intent, stating that expeditious liquidations are necessary "to achieve minimal disruption to the financial system." S. Rep. No. 19, 100th Cong., 1st Sess. 25 (1987).

In light of Congress's intent that FSLIC accomplish liquidations expeditiously, *de novo* judicial adjudication of claims unquestionably would "restrain or affect" (12 U.S.C. 1464(d)(6)(C)) the exercise of FSLIC's functions as receiver. As the Fifth Circuit has recognized (*Hudspeth*, 756 F.2d at 1102):

> [R]esolution of even the facial merits of claims outside of the statutory reorganization process would delay the receivership function of distribution of assets: the FSLIC would not be able to determine how much to pay other claimants until the termination of the parallel litigation. Given the overriding Congressional purpose of expediting and facilitating the FSLIC's task as receiver, such a delay is a "restraint" within the scope of the statute.

Coit's only response to this concern is the assertion (Br. 21-22) that the administrative process followed by APA review actually will take *longer* than judicial adjudication in the first instance. But this suggestion is belied both by the considerations mentioned above and by FSLIC's own experience. FSLIC's experience demonstrates that only a small percentage of all claims filed eventually reach the federal courts, because many claimants are satisfied by the administrative resolution of their claims. Moreover, the issue in the relatively few cases that do reach the courts is limited to whether the Bank Board's decision was arbitrary, capricious, or not supported by substantial evidence. See 5 U.S.C. 706.

These cases are determined on the basis of the administrative record. There is no need for discovery, evidentiary hearings, trial, or other time-consuming activities associated with *de novo* judicial proceedings.

Second, *de novo* judicial adjudication of claims imposes a far greater drain on receivership assets than does administrative adjudication followed by APA review. The administrative process is far less formal than the judicial process and therefore is less costly. Additionally, the expertise of the Bank Board makes resolution of claims by the Board simpler and less expensive than resolution by the courts.

Because, in the distribution of the S&L's assets, FSLIC's litigation expenses have priority over creditors' claims, the extent of FSLIC's litigation expenses has a direct bearing on the amount of money FSLIC ultimately is able to disburse to creditors. The greater FSLIC's expenses, the greater the likelihood that FSLIC will not be able to pay valid creditors who are low on the list of priorities. Similarly, the greater FSLIC's expenses, the smaller the pro rata share of creditors whom FSLIC is able to pay. In short, any process that significantly increases FSLIC's litigation expenses significantly interferes with its duty to "pay all valid credit obligations" (12 U.S.C. 1729(b)(1)(B)).

Furthermore, the added expense of *de novo* judicial adjudication of claims could force FSLIC to allow questionable claims merely because the cost of litigating them might be greater than the expected pro rata payout. That result can hardly constitute liquidation "in an orderly manner" (12 U.S.C. 1729(b)(1)(A)(v)) and, because it reduces the pro rata shares of valid claimants, it again conflicts with FSLIC's duty to "pay all valid credit obligations" (12 U.S.C. 1729(b)(1)(B)).

Third, judicial adjudication of claims in the first instance poses a real danger that courts will render inconsistent judgments with respect to the *same* receivership assets. For example, numerous failed institutions have been involved as participants in massive construc-

tion projects around the country. Each of the other participants in these projects (*e.g.*, contractors, developers, and other lenders) might have a claim against the receivership. If each participant pursued its remedies in a different court, FSLIC could be subjected to inconsistent judgments concerning the property that secured the participation interests. Once more, this outcome is squarely at odds with any notion of orderly liquidation.

Fourth, permitting *de novo* court adjudication requires subjecting FSLIC as receiver to different rules in each of the several forums in which claims might be brought. This eventuality frustrates the goal of orderly liquidation and raises the specter of forum-shopping. Claimants who can afford to shop for favorable forums will be advantaged vis-a-vis other claimants. This is inconsistent with the duty to treat similarly situated claimants equally, which is inherent in the duty to pay all valid credit obligations to the extent of available assets.

Congress intentionally gave the Bank Board broad authority to regulate the liquidation of insolvent S&Ls. In commenting on the Bank Board's similarly-worded authority to regulate ongoing S&Ls, this Court observed that "'[i]t would have been difficult for Congress to give the Bank Board a broader mandate.'" *de la Cuesta*, 458 U.S. at 161 (quoting *Glendale Federal Savings & Loan Ass'n v. Fox*, 459 F. Supp. 903, 910 (C.D. Cal. 1978)). The Court further explained that HOLA's legislative history "confirm[s] our reading of the statutory language and the Board's plenary authority to regulate the operations of federal savings and loans. * * * *Nowhere is there a suggestion of any intent somehow to limit the Board's authority.*" *Id.* at 163-164 (emphasis added). As with the Board's power to regulate ongoing S&Ls, Congress gave absolutely no indication of an intent implicitly to limit the Board's power to regulate liquidation of failed S&Ls. Indeed, by specifically *excluding* S&Ls from the provisions of the Bankruptcy Code, see 11 U.S.C. 109(b)(2), Congress placed all hope for coherent liquidation of S&Ls in the Bank Board's hands.

In sum, when the exclusion from the Bankruptcy Code is read in light of the broad language authorizing the Bank Board's receivership powers, the conclusion is manifest that "it would have been difficult for Congress to give the Bank Board a broader mandate." And given the delay, expense, and inconsistency inherent in court adjudication of claims against failed S&Ls, it is inconceivable that Congress's grants of authority to FSLIC and the Bank Board, and its proscription against court interference with the functions of FSLIC as receiver, can mean anything other than that FSLIC and the Board have exclusive authority to adjudicate such claims in the first instance.

2. *The Bank Board's long-standing regulations giving FSLIC exclusive authority to adjudicate claims in the first instance constitute a reasonable interpretation of the S&L statutes.*

FSLIC's authority to resolve claims against S&Ls in receivership rests on more than just the language of the Bank Board's various statutes. Congress gave the Bank Board authority to issue regulations for the conduct of receiverships for federal S&Ls in 1933 and clarified that power in 1966. Financial Institution Supervisory Act of 1966, Pub. L. No. 89-965, § 101(a), 80 Stat. 1028 (codified as amended at 12 U.S.C. 1464(d)(11)). For more than 30 years, the Bank Board's administrative regulations have construed the statutory scheme as giving FSLIC exclusive authority to adjudicate claims in the first instance.

The Bank Board published its receivership regulations for federal associations in 1956. Those regulations remain essentially unchanged today. Among other things, they provide that (12 C.F.R. 549.4(b) (emphasis added)):

> The receiver shall allow any claim seasonably received and *proved to its satisfaction.* The receiver may wholly or partly disallow any creditor claim or claim of security, preference, or priority not so proved, and shall notify the claimant of the disallowance and the reason therefor. * * * Unless, within 30 days after notice is mailed, the claimant files a written request for payment regardless of the dis-

allowance, disallowance shall be final, except as the Board may otherwise determine.

This Court has interpreted similar language in the old Bankruptcy Act as constituting authorization to adjudicate claims. That Act empowered bankruptcy courts to "[a]llow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates." Bankruptcy Act of 1898, § 2(a)(2) (formerly codified at 11 U.S.C. 11(a)(2)) (repealed 1978). The Court held that the bankruptcy courts' authority included the "full power to inquire into the validity of any alleged debt or obligation of the bankrupt upon which a demand or a claim against the estate is based,'" and it noted that the process of proof, allowance, and distribution constitutes "'adjudication.'" *Katchen* v. *Landy*, 382 U.S. 323, 329 (1966) (citations omitted).

Thus, the Bank Board's regulations, which use language similar to that of the old Bankruptcy Act, make it clear that FSLIC is to adjudicate claims in the first instance, subject to review by the Bank Board. As the Seventh Circuit recently noted, "Congress has made several amendments to the statutory framework over the course of the past thirty years, but has never limited the FSLIC's authority to adjudicate claims." *Lyons Savings & Loan Ass'n* v *Westside Bancorporation*, 828 F.2d 387, 392 (1987) (citations omitted). Indeed, in 1966 Congress clarified the Bank Board's rulemaking authority, eliminating any doubt that the Board has power to issue regulations governing the conduct of liquidating receiverships. See 12 U.S.C. 1464(d)(11). Consequently, the Bank Board's long-standing interpretation of Section 1729(d), undisturbed, and implicitly acquiesced in, by Congress, is entitled to great weight, and should not be disregarded unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 844 (1984).[3]

[3] Amicus United States League of Savings Institutions (League) contends (League Am. Br. 23-26) that until the 1980s FSLIC and the Bank Board had never asserted that FSLIC has exclusive authority to adjudicate claims in the first instance and suggests, therefore, that the position of FSLIC and the Board is neither consistent nor long-standing. The League's argument is incorrect. The Board and FSLIC have *always* taken the position that FSLIC has exclusive authority to adjudicate claims. Because very few federally chartered S&Ls were liquidated prior to the 1980s, however, FSLIC had only occasional opportunity to assert this position in court. But when the issue has arisen, FSLIC has taken the same position that we advance in this brief. See, *e.g.*, *Community Fed. Savings & Loan Ass'n* v. *Fields*, 128 F.2d 705, 706 (8th Cir. 1942).

The Bank Board's receivership regulations are not arbitrary; nor are they "manifestly contrary to the statute." Rather, they are fully in accord with the language and purposes of the Bank Board's statutes. As shown above, permitting court adjudication in the first instance would engender additional expense, delay, and inconsistency in the resolution of claims against the receivership estate. These results can serve only to damage public confidence in FSLIC and the S&L industry. See S. Rep. No. 1263, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 2530, 2540 ("Timely insurance payouts are vital * * * to preserve the confidence of the public at large in the safety and stability of savings and loan associations in general.").

3. *The history of banking receiverships supports the view that the S&L statutes and regulations accord FSLIC exclusive authority to adjudicate claims in the first instance.*

Still further support for the Bank Board's interpretation of its statutes and regulations is provided by the history of banking receiverships as of the time Congress enacted 12 U.S.C. 1729(d). Originally, banking institutions in default were liquidated pursuant to court-appointed receiverships. In these "equity receiverships," the receiver was a court officer who acted as an agent of the court that appointed him, and the court itself was responsible for the administration of the estate. See *Porter* v. *Sabin*, 149 U.S. 473, 478 (1893); R. Clark,

Law of Receivers § 11, at 13-14 (3d ed. 1959). All of the equity receiver's actions, including determination of claims, were subject to review in the appointing court.

Because of the need for constant court supervision, "the process of liquidation of insolvent banks through the instrumentalities of the courts had been extended over many years, engendering public complaint and criticism." *Abbott* v. *Morris*, 101 W. Va. 127, 133, 132 S.E. 372, 374 (1926); see also Note, *The Appointment of Receivers for National Banks*, 44 Harv. L. Rev. 618, 618 (1931) ("In the case of banks procedural difficulties make judicial handling of liquidation and reorganization particularly difficult."). The states came to recognize "that the urgent and delicate issues involved in a bank closure, affecting as they do not only large sums of money, but the credit and assets of its depositors, both large and small, are all matters which are ill suited for lengthy court hearings." *State ex rel. Arnold* v. *Egnor*, 275 S.E. 2d 15, 21 (W. Va. 1981). As a consequence, many states replaced court receiverships with statutory bank receiverships.

In a statutory receivership, the legislature determines if, when, and under what circumstances decisions made by the receiver may be subject to court review. See *Wm. Filene's Sons Co.* v. *Weed*, 245 U.S. 597, 602 (1918) ("When a statutory [receivership] system is administered the only question for the Courts is what the statutes prescribe."); *Hulse* v. *Argetsinger*, 18 F.2d 944, 945-946 (2d Cir. 1927) (L. Hand, J.) (national bank receiver appointed by the Comptroller of the Treasury pursuant to the National Bank Act is not subject to the court's supervision, except as the National Bank Act prescribes); 9 C. Zollman, *The Law of Banks and Banking* § 6101, at 216 (1936) (statutory receiver is "subject only to the judgment of [equity] courts as the Legislature itself may have provided for").

By the time Congress created FSLIC in 1934, 21 states and the District of Columbia had enacted purely statutory

liquidation schemes for insolvent building and loan associations. Note, *Statutory Control over the Dissolution of Building and Loan Associations*, 35 Colum. L. Rev. 265, 267 n.20 (1935).[4] It was in this climate of rejection of the role of courts in the receivership process that Congress provided for FSLIC's receivership function. In so doing, Congress did *not* provide for judicial determination of claims in the first instance.[5] In light of the history of banking receiverships and the general rule restricting judicial control over a statutory receiver absent express legislative consent, it is reasonable to interpret the NHA and the HOLA as according FSLIC a similar power to adjudicate claims in the first instance. See C. Sutherland, *Statutory Construction* § 49.01, at 347 (4th ed. 1984) ("Statutes are documents having practical

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[4] Another six states provided for judicial appointment of receivers, but gave those receivers a level of freedom from court interference similar to that of purely statutory receivers. Note, 35 Colum. L. Rev. at 267 n.21.

[5] Because Coit and Amicus League do not recognize the distinction between statutory and equity receiverships, they incorrectly rely upon *Riehle* v. *Margolies*, 279 U.S. 218 (1929), *Morris* v. *Jones*, 329 U.S. 545 (1947), and *Grant* v. *Buckner*, 172 U.S. 232 (1898), for the proposition that adjudication of claims is not a receivership function. These cases all involved equity receiverships and therefore are inapposite. (Moreover, because no statutes were involved, there were no provisions analogous to 12 U.S.C. 1464(d)(6)(C) and 1729(d), preventing initial judicial adjudication.)

This lack of understanding of the difference between statutory and equity receiverships also plagues the League's attempt (Br. 20-21) to contrast FSLIC's receivership powers with its powers to supervise ongoing S&Ls. The League points out that Congress provided FSLIC with detailed statutory guidance for the exercise of FSLIC's supervisory functions but did not do so with respect to FSLIC's receivership capacity. The League infers from this that Congress did not intend "to establish an exclusively administrative claims determination procedure." What the League fails to appreciate, however, is that Congress did not need explicitly to divest courts of power to adjudicate in the first instance claims against failed S&Ls. In statutory receivership schemes, including the one Congress established for S&Ls, courts have *no* role that is not assigned to them by the legislature. See page 14, *supra*.

effects. It is therefore improper to construe them in the abstract, without taking into consideration the historical framework in which they exist.").

4. ***The language of other federal banking statutes confirms that the S&L statutes grant FSLIC exclusive authority to adjudicate claims in the first instance.***

Other banking statutes enacted by Congress bolster this interpretation. For example, Congress recently amended the Federal Credit Union Act to add language virtually identical to that of 12 U.S.C. 1464(d)(6)(C):

> Except as otherwise provided in this subparagraph, no court may take any action for or toward the removal of any liquidating agent or, except at the instance of the [National Credit Union Administration] Board, restrain or affect the exercise of powers or functions of a liquidating agent.

Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 714(a), 101 Stat. 552, 654 (to be codified at 12 U.S.C. 1787(a)(1)(B)). In addition, Congress amended its description of the NCUAB's liquidation functions, which have always tracked FSLIC's, to parallel Section 1729(d) exactly:

> In connection with the liquidation of any insured credit union, the Board shall have the power to carry on the business of and collect all obligations to the credit union, to settle, compromise, or release claims in favor of or against the credit union, and to do all other things that may be necessary therewith, subject only to the regulation of the Board, or, in cases where the Board has been appointed liquidating agent solely by a public authority having jurisdiction over the matter other than said Board, subject only to the regulation of such public authority.

12 U.S.C. 1788(c), as modified by Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 714(b), 101 Stat. 552, 655 (to be codified at 12 U.S.C. 1787(j)).

Congress stated in unequivocal terms its purpose for giving the NCUAB liquidation powers essentially identical to those of FSLIC:

> The Committee expects that liquidations conducted under this section *shall be accomplished as expeditiously as possible in order to achieve minimal disruption to the financial system.* Creditor, member and other claimants must be dealt with in a fair manner. These amendments clarify the [National Credit Union Administration Board's] authority to *adjudicate* liquidation claims. *Upon final agency action, a claimant may seek recourse in court under the provisions of the Administrative Procedure Act.*

S. Rep. No. 19, 100th Cong., 1st Sess. 25 (1987) (emphasis added). Obviously, Congress believed that FSLIC's powers, which it used as a template for NCUAB's powers, include the exclusive authority to adjudicate claims in the first instance, and it also evidently believed that such powers are essential to resolve creditor claims expeditiously, in order to avoid "disruption to the financial system."

It is instructive as well that the National Bank Act explicitly gives creditors the option of presenting their claims for administrative determination *or* seeking adjudication in a court of competent jurisdiction. See 12 U.S.C. 194. This statute was in existence when the S&L statutes were enacted. Indeed, Congress used it as a model for much of the S&L legislation. See, *e.g.*, H.R. Rep. No. 1922, 73d Cong., 2d Sess. 4 (1934). Yet Congress did not provide explicitly for judicial adjudication of claims in the S&L context as it had in the national bank context. Furthermore, unlike in the national bank context, Congress gave the S&L receiver power to settle or release claims subject only to regulation by the Bank Board. These deviations from the national bank model provide yet another strong indication that Congress intended FSLIC's adjudicative role to be exclusive. See *Wheeler* v. *Greene*, 280 U.S. 49, 51 (1929) ("When so important a grant of power contained in the prototype

is left out from the copy it is almost impossible to attribute the omission to anything but design, or to believe that it left to very attenuated implications what the model before it so clearly expressed."). Coit's reliance (Br. 28-29) on the FDIC's lack of adjudicative authority is therefore misguided.

B. The Arguments Of Coit And Its Amici Do Not Detract From The Conclusion That Congress Gave FSLIC Exclusive Authority To Adjudicate Claims In The First Instance.

Coit and its amici offer little reason to disagree with FSLIC's reading of 12 U.S.C. 1464(d)(6)(C) and 1729(d) and the Bank Board's implementing regulations. Coit's principal attack on FSLIC's reading of the statutes focuses upon 12 U.S.C. 1464(d)(6)(C). Specifically, Coit argues (Br. 12) that that section can be construed in only two ways: the provision either does not bar courts from adjudicating claims in the first instance or bars *any* role for the courts, including that of reviewing administrative determinations under the APA. Thus, in Coit's view, the Fifth Circuit's decision in *Hudspeth* is "internally inconsistent." It is Coit's "all or nothing" argument, however, that is wholly inconsistent and illogical. Absent specific congressional direction, there is a strong presumption that agency action is subject to judicial review. See *Traynor* v. *Turnage*, 108 S.Ct. 1372, 1378 (1988); *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). Accordingly, it is hardly "internally inconsistent" to conclude that Congress meant to prohibit judicial determination of claims in the first instance, because such adjudications would have the greatest tendency to "restrain or affect" the receiver, but not to disturb the courts' long-standing jurisdiction to review *final* agency determinations under the APA.

Perhaps recognizing the futility of arguing that Sections 1464(d)(6)(C) and 1729(d) and the Board's regulations do not give FSLIC exclusive adjudicatory authority, Coit and its amici quickly turn to other statutory provisions that are unrelated to the processing of claims

against receiverships. These insubstantial arguments merely demonstrate Coit's failure to comprehend the distinction between FSLIC's corporate and receivership capacities. For example, Coit cites (Br. 26-27) FSLIC's power to "sue and be sued," 12 U.S.C. 1725(c)(4), and infers from this that Congress viewed FSLIC more as a potential litigant than as an adjudicator. It is plain from the face of this provision, however, that the "sue and be sued" authority refers to FSLIC's corporate capacity, as distinct from its receivership capacity.

Similarly, Coit relies on the NHA's three-year limitation on depositor actions against FSLIC. 12 U.S.C. 1728(c). It argues that this provision anticipates that FSLIC will be required to defend depositor suits in court and that therefore Congress also must have envisioned that FSLIC will defend creditor suits in court. This argument again misses the crucial distinction between FSLIC's corporate and receivership capacities. FSLIC makes insurance coverage determinations in its corporate capacity, see 12 C.F.R. 564.1, not its receivership capacity. Section 1464(d)(6)(C)'s prohibition against restraints on receivership functions does not apply to FSLIC's corporate capacity and therefore does not apply to deposit insurance disputes. Thus, contrary to Coit's suggestion, it is perfectly logical to interpret the explicit limitation of Section 1728(c) to *depositor* suits, and the absence of any statute of limitations expressly governing *creditor* suits, as indicating that Congress did *not* anticipate that FSLIC would be sued in its receivership capacity.

Coit bases its next argument on 12 U.S.C. 1730(k)(1). This provision grants the federal district courts jurisdiction over lawsuits to which FSLIC is a party, subject to the proviso that when FSLIC is conservator, receiver, or legal custodian for a state-chartered S&L and the lawsuit involves only state-law rights of investors, creditors, stockholders, or the S&L, the relevant state court has jurisdiction. Coit contends (Br. 27) that this proviso, "which was intended to keep certain actions in state

courts, indicates what type of suits Congress expected FSLIC to defend against in state courts," and, by implication, the type of suits Congress intended FSLIC to defend in federal court. Contrary to Coit's suggestion, however, Section 1730(k)(1) is not an independent grant of jurisdiction over claims that have long been withheld from the judicial process. Rather, it merely accomplishes with respect to state-supervised receiverships what Section 1464(d)(6)(C) accomplishes with respect to Bank Board-supervised receiverships: ensuring that claims are centralized in the forum responsible for overseeing the receiver.

Finally, both Coit (Br. 29 n.23) and amici Watson *et al.* (Watson Am. Br. 8-10) argue that because FSLIC must bring claims on behalf of insured S&Ls in court, requiring claims against insured S&Ls to be brought in the administrative forum raises the possibility that a single controversy arising out of the same set of operative facts will be subject to simultaneous proceedings in two forums. They argue that this hypothetical situation, which neither Coit nor Watson has ever faced, is both inefficient and unfair. It is certainly true that as to any particular case it is more efficient to resolve all issues involving the same set of facts in a single forum. It does not follow, however, that the mere possibility of bifurcated adjudication in some indeterminate number of cases makes it more efficient to accord courts *de novo* jurisdiction over claims against the receiver. In giving FSLIC exclusive authority to adjudicate claims against failed S&Ls in the first instance, Congress provided a mechanism for promptly determining those claimants with a valid claim against the receivership assets. By contrast, court adjudication of suits brought *by* FSLIC does not affect the number of creditors entitled to share in the estate.

Coit's and Watson's fairness argument also misses the mark. If the Bank Board rejects a claim against the estate, FSLIC may well argue that that determination bars certain defenses to an action by FSLIC against the

claimant in the judicial arena. However, collateral estoppel applies only if the court holds that the claimant had a full and fair opportunity to litigate the issue in the administrative forum. See *University of Tennessee* v. *Elliott*, 106 S. Ct. 3220, 3227 (1986). If the court makes such a finding, it is hard to see how the litigant can complain about unfairness.

II. THE SYSTEM ESTABLISHED BY CONGRESS FOR THE RESOLUTION OF CLAIMS AGAINST A FAILED SAVINGS AND LOAN ASSOCIATION DOES NOT VIOLATE THE CONSTITUTION

Coit asserts that the administrative claims process violates Article III, the Due Process Clause, and the Seventh Amendment. This Court, like the court of appeals (see Pet. App. A4), should not reach these issues because they are not ripe. In any event, Coit's constitutional objections are wholly insubstantial.

A. According FSLIC Exclusive Authority To Adjudicate Claims In The First Instance Does Not Violate Article III Of The Constitution.

Coit asserts that according FSLIC exclusive authority to adjudicate claims in the first instance violates Article III of the Constitution. This Court recently set forth a balancing approach for resolving such contentions:

> [I]n reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary. Among the factors upon which we have focused are [1] the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, [2] the origins and importance of the right to be adjudicated, and [3] the concerns that drove Congress to depart from the requirements of Article III.

CFTC v. *Schor*, 106 S. Ct. 3245, 3258 (1986) (citations omitted). Applying this approach to FSLIC's adjudicative authority demonstrates that Congress has not violated Article III.

1. *The administrative claims process reserves the essential attributes of judicial power to Article III courts.*

The administrative claims process satisfies the first of *Schor*'s indicia of constitutionality because, despite the delegation of certain adjudicative functions to FSLIC and the Bank Board, Article III courts retain the "essential attributes of judicial power." In the case of the administrative claims process administered by FSLIC and the Board, Congress has not delegated "all ordinary powers of district courts," as it did in the bankruptcy judge legislation held invalid in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 85 (1982). Thus, like the CFTC in *Schor* and unlike the bankruptcy judges in *Northern Pipeline*, FSLIC and the Bank Board have no authority to preside over jury trials, issue writs of habeas corpus, or cite individuals for contempt. Compare *Schor*, 106 S. Ct. at 3259, with *Northern Pipeline*, 458 U.S. at 85. FSLIC and the Board have no power to compel process or issue any kind of order. Like the CFTC, and unlike bankruptcy judges, FSLIC and the Board must apply to the courts to enforce their determinations. Compare *Schor*, 106 S. Ct. at 3259, with *Northern Pipeline*, 458 U.S. at 85.

Furthermore, Congress has left ample opportunity for judicial review of Bank Board claims determinations. Pursuant to the APA, Article III courts may review all of the Bank Board's decisions of law *de novo*, and may review its findings of fact to determine whether they were arbitrary, capricious, or not supported by substantial evidence. 5 U.S.C. 706. See *Ass'n of Data Processing Service Organizations, Inc.* v. *Bd. of Governors of the Federal Reserve System*, 745 F.2d 677, 683-684 (D.C. Cir. 1984) (Scalia, J.) (arbitrary and capricious review encompasses review for substantial evidence).[6] This standard of review, which is far more searching than the "fraud, misconduct, or misrepresentation" standard held adequate to preserve the "'appropriate exercise of the judicial function'" in *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568, 592 (1985) (citation omitted), is fully adequate to preserve the essential role of Article III courts. See Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 976-991 (1988) (questions of law should be reviewable *de novo*; questions of fact should be reviewable, if at all, for substantial evidence).

Significantly, the standard for reviewing Bank Board determinations is no less stringent than the standard of review that prevailed for adjudications by referees under the Bankruptcy Act of 1898. Although that standard varied somewhat over time,[7] it never permitted *de novo* judicial proceedings, and yet was never subject to serious challenge. Cf. *Northern Pipeline*, 458 U.S. at 92 (Burger, C.J., dissenting). Currently, the decisions of bankruptcy courts in core proceedings are subject to review by the district court under the clearly erroneous standard. Bankruptcy Rule 8013. See also Bankruptcy Rule 8006 (prohibiting presentation of new evidence before the district court).

The process of liquidating an S&L is no different from the process of liquidating any other bankrupt. If deferential review of decisions by non-Article III adjudicators in core bankruptcy proceedings has never been found to violate Article III, there is no reason why deferential

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[6] Two courts of appeals have stated that claimants dissatisfied with the Bank Board's determinations are entitled to judicial review under the APA following exhaustion of their administrative remedies. See *Lyons*, 828 F.2d at 390; *Hudspeth*, 756 F.2d at 1103.

[7] Compare *In re Van Jeffreys*, 50 Am. B.R. (N.S.) 328 (W.D. Pa. 1942) (referee's order not to be set aside unless no testimony supports it or referee acted arbitrarily or capriciously), with *In re Bresnan*, 45 F.2d 193, 194 (D. Md. 1930) (referee's findings are not to be set aside unless "manifestly erroneous").

review of adjudications with respect to the assets of insolvent S&Ls should suffer from Article III deficiencies.

In short, other than the power to decide claims in the first instance, all attributes of judicial power remain in Article III courts. In this sense, FSLIC and the Bank Board are just like all other federal agencies empowered to adjudicate issues within their area of expertise. If FSLIC and the Board do not satisfy the first prong of the *Schor* test, neither would the National Labor Relations Board, the Social Security Administration, the Federal Trade Commission, and dozens of other agencies that perform adjudicative functions subject to judicial review under the APA.

2. *The claims that Congress gave FSLIC exclusive authority to adjudicate are of the type that traditionally need not be given to Article III courts.*

Congress gave FSLIC authority to make the initial determination of a narrow category of claims: creditors' claims against property that FSLIC possesses as receiver for an insolvent S&L. FSLIC has no power to adjudicate issues involving assets not in its possession. If it believes that property in the possession of a third party is part of the insolvent S&L's assets, it must seek possession of that property in court. Similarly, if the S&L has any kind of claims for damages against a third party, FSLIC must pursue that claim in court.

Again, a compelling analogy exists between FSLIC's role as receiver and the role of bankruptcy referees under the Bankruptcy Act of 1898. The adjudicative jurisdiction of these referees "was circumscribed by notions of possession of property." 1 *Collier on Bankruptcy* ¶ 3.01, at 3-9 (15th ed. 1987). Thus, under the 1898 Act, the trustee had to proceed in federal or state court to seek property of the bankrupt in the possession of a third party and to bring any kind of action against a third party on the bankrupt's behalf. *Id.* at 3-9 to 3-11.

The Bankruptcy Reform Act of 1978 superseded the 1898 Act and gave non-Article III bankruptcy courts jurisdiction to hear "all civil proceedings arising under [the Bankruptcy Code] or arising in or *related to* cases under [the Bankruptcy Code]." Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, ch. 90, § 1471(b), (c), 92 Stat. 2549, 2668 (formerly codified at 28 U.S.C. § 1471(b), (c)) (emphasis added). Under this provision, "[t]he idea of possession or consent as the sole bases for jurisdiction [was] eliminated. The bankruptcy court [was] given in personam jurisdiction as well as in rem jurisdiction to handle everything that [arose] in a bankruptcy case." H.R. Rep. No. 595, 95th Cong., 1st Sess. 445 (1977).[8] It was this practically unbounded grant of jurisdiction to non-Article III bankruptcy courts that resulted in the invalidation of the Bankruptcy Reform Act in *Northern Pipeline*.

Northern Pipeline involved a contract claim by the bankrupt against a third party. Under the 1898 Act, the trustee would have had to bring this action in either state court or an Article III federal court. See Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 Creighton L. Rev. 441, 460 (1983). The Bankruptcy Reform Act, however, permitted the non-Article III bankruptcy court to hear the claim.

The *Northern Pipeline* plurality noted that Congress could have given non-Article III courts jurisdiction to hear certain claims relating to the bankrupt, but not others: "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a 'public right,' but the latter obviously is not." 458 U.S. at 71. This distinction implicitly adopts the division of adjudicative authority that existed for

[8] The quoted language referred to a House bill that would have made the bankruptcy courts Article III tribunals. The description of the jurisdiction of the courts, however, applies equally to the non-Article III courts that Congress eventually created. See 1 *Collier on Bankruptcy*, *supra*, ¶ 3.01, at 3-9 n.7.

decades under the 1898 Act. Adjudication of claims against the assets of the bankrupt in the trustee's possession is part and parcel of "the restructuring of debtor-creditor relations." Adjudication of the bankrupt's claims against third parties is not.[9]

As noted above, the claims Congress authorized FSLIC to adjudicate are of precisely the same nature as the cases a referee was empowered to adjudicate under the 1898 Act. The distinction drawn by the *Northern Pipeline* plurality thus makes clear that Congress is constitutionally entitled to delegate the initial resolution of such claims to a non-Article III forum.

3. Congress's decision to delegate adjudicative authority to FSLIC is supported by strong policy reasons.

Congress's reasons for wanting FSLIC to adjudicate all claims in the first instance are compelling. Put succinctly, Congress's paramount concern in enacting the S&L trilogy and the various amendments thereto has been to assist homeowners by assisting S&Ls. Absolutely necessary to achievement of this goal is the fostering of public confidence in the S&L industry and the agencies that regulate it. The public must be willing to deposit money in S&Ls and provide goods and services to S&Ls if the S&L industry is to survive. Congress gave FSLIC and the Bank Board exclusive power to adjudicate claims against S&Ls in liquidating receiverships to avoid the delay, expense, and inconsistencies of court adjudication that could reflect badly upon the state of the S&L industry and could adversely affect the ability of its regulators to assure that depositors and creditors of S&Ls will be promptly and fairly treated in the event an S&L fails. This compelling purpose fully justifies Congress's decision to centralize claims against the assets of failed S&Ls in an administrative forum.

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[9] In any event, Coit's reliance (Br. 43) on the public right/private right distinction is entirely misguided in light of this Court's adoption of the multifactor approach in *Schor*. See *Schor*, 106 S.Ct. at 3259.

Thus, because Article III courts retain the essential attributes of judicial power, because the disputes delegated to FSLIC for initial adjudication are of the kind that need not be directed to an Article III court, and because Congress had weighty reasons for giving FSLIC adjudicatory power, the administrative claims process is fully consistent with Article III.

B. Authorizing FSLIC To Serve As The Exclusive Adjudicator Of Claims In The First Instance Does Not Constitute A Per Se Violation Of The Due Process Clause.

Coit contends that FSLIC's role as exclusive adjudicator of claims in the first instance per se violates due process. The basis for this contention is that FSLIC serves the dual function of insurer and liquidator. The fewer claims that FSLIC allows in its receivership capacity, Coit argues, the more money that FSLIC in its insurance capacity is able to recoup as subrogee to the depositors' claims. This syllogism creates what Coit views as an inherent conflict of interest in violation of due process.[10]

This argument totally ignores Congress's mandate to FSLIC to pay all valid credit obligations, 12 U.S.C. 1729(b)(1)(B), and to "give due consideration to the interest of all of the claimants upon the assets of the association * * *." S. Rep. No. 1263, 90th Cong., 2d

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[10] Coit relies primarily upon *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), and *Tumey* v. *Ohio*, 273 U.S. 510 (1927). However, the instant case is more like *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238 (1980), in which the Court upheld the child labor enforcement provision of the Fair Labor Standards Act against a due process challenge. The Court noted in *Jerrico* that although fines assessed against violators are returned to the Department of Labor, neither the officials responsible for determining violations in the first instance, nor their regional offices, stand to gain from assessment of penalties. *Id.* at 250-251. The *Jerrico* Court contrasted this lack of a personal stake with the financial incentives present in *Ward* and *Tumey*. See *id.* at 251. Here, as in *Jerrico*, the possibility of inherent bias is minimized by the absence of personal incentives for FSLIC adjudicators to deny claims unjustly.

Sess. 10 (1968). In carrying out their statutory mandates, all agencies, including FSLIC, are entitled to a presumption "that they will act properly and according to law." *FCC* v. *Schreiber*, 381 U.S. 279, 296 (1965). As the Court said in dismissing a due process challenge to the Bank Board's dual roles of appointing conservators and presiding over hearings to determine whether the conservators were properly appointed, it is inappropriate for courts to "assume in advance that an administrative hearing may not be fairly conducted." *Fahey* v. *Mallonee*, 332 U.S. 245, 256 (1947).

Moreover, the dual role Congress gave FSLIC is not unique in administrative law. Several administrative agencies adjudicate claims that, if allowed, would decrease the amount of funds that they are charged with administering. The Social Security Arministration (SSA) is but the most obvious example. It adjudicates thousands of disputes involving direct disbursements from the various insurance trust funds it administers. SSA's interest in the outcome is directly analogous to FSLIC's because SSA too has conflicting responsibilities to conserve the trust funds but also pay valid claims.

In considering challenges to congressional delegations of power to administrative agencies, the Court repeatedly has stressed that the burden to establish a per se due process violation is a heavy one. There is a "strong presumption in favor of the validity of congressional action" in light of the " 'congressional solicitude for fair procedure * * *.' " *Schweiker* v. *McClure*, 456 U.S. 188, 200 (1982) (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979)). Coit has suggested no persuasive reason for departing from long-settled precedent eschewing determinations of per se due process violations. It is possible that due process might be violated in an individual case. Claimants properly may assert such a violation before the Board, which reviews FSLIC's determinations of the invalidity of claims *de novo*. If claimants are still dissatisfied following Bank Board review, they may raise the same contention in court. Access to administrative and judicial review fully protects their due process rights. There is no need to go further and invalidate the entire claims determination process based on unsubstantiated allegations of potential bias.

C. The Seventh Amendment Does Not Bar FSLIC Adjudication Of Claims In The First Instance.

Coit contends that authorizing FSLIC to decide all claims in the first instance deprives claimants of their Seventh Amendment right to jury trial. This Court has stated repeatedly, however, that "there is little or no basis for concluding that the Amendment should * * * be interpreted to provide an impenetrable barrier to administrative factfinding under *otherwise valid* federal regulatory statutes." *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 460 (1977) (emphasis added); see also *Curtis* v. *Loether*, 415 U.S. 189, 194 (1974) (footnote omitted) ("[T]he Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the [agency's] role in the statutory scheme.").

In other words, if Congress may delegate authority to adjudicate a claim to an agency without violating Article III or due process, the Seventh Amendment does not bar that delegation even though the jury trial right might have applied had Congress left authority to adjudicate that claim with the courts. *Pernell* v. *Southall Realty*, 416 U.S. 363, 383 (1974) (explaining *Block* v. *Hirsh*, 256 U.S. 135, 158 (1921)).

In any event, even if the valid delegation of authority to FSLIC were not dispositive of the Seventh Amendment issue, claimants in the administrative process would not have a right to jury trial. That right is circumscribed by one inherent limitation: the action must be of the type that would have been tried in courts of law, as opposed to courts of equity or admiralty, at the time the Seventh Amendment was adopted. *Atlas Roofing*,

430 U.S. at 449. Claims raising equitable issues or seeking equitable relief are not claims "at common law" and do not give rise to the jury trial right. *Id.* at 449; *Katchen*, 382 U.S. at 336-338.

Coit's claims against FSLIC seek adjudication of interests in FirstSouth assets now in FSLIC's possession and control by virtue of its appointment as liquidating receiver. This Court has held that claims against a bankruptcy estate sound in equity, not at law, and that therefore the right to jury trial is inapplicable. See *Katchen*, 382 U.S. at 336-337; *Barton* v. *Barbour*, 104 U.S. 126, 134 (1881) ("a claim of debt or damages against the bankrupt is investigated by chancery methods"). The Court has explained that even if a claimant against a bankruptcy estate might otherwise be entitled to a jury trial, "when the same issue arises as part of the process of allowance and disallowance of claims, it is triable in equity. The Bankruptcy Act passed * * * to establish uniform laws on the subject of bankruptcy, converts the creditor's legal claim into an equitable claim to pro rata share of the *res* * * *." *Katchen*, 382 U.S. at 336 (citations omitted).

The S&L statutes serve the same function as the old Bankruptcy Act. They create an orderly process for the allowance and disallowance of claims against an insolvent institution, so that pro rata shares of the receivership estate may be determined. Cf. *Barton*, 104 U.S. at 134 ("Very analogous to the case of an assignee in bankruptcy is that of a receiver of an insolvent railroad company or other corporation."). Thus, they too convert legal claims into equitable ones. Accordingly, FSLIC, like the bankruptcy courts under the old Bankruptcy Act, need not provide a jury trial when performing its claims determination function.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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